Road, Unit 133, Riverdale, MD 20737–1236; (301) 734–8758.

SUPPLEMENTARY INFORMATION: In a proposed rule published in the **Federal Register** on May 24, 2004 (69 FR 29466–29477, Docket No. 03–022–3), we proposed to amend the regulations in 7 CFR 319.56–2ff to expand, from 31 to 50, the number of States (plus the District of Columbia) in which fresh Hass avocado fruit grown in approved orchards in approved municipalities in Michoacan, Mexico, may be distributed. In a rule published in the **Federal Register** on November 30, 2004 (69 FR 69747–69774, Docket No. 03–022–5), and effective on January 31, 2005, we adopted our proposed rule as a final rule, with changes made in response to public comments we received on the proposed rule. Those changes included the adoption of temporary restrictions on the distribution of avocados (contained in § 319.56–2ff(c)(3)(vii) of the regulations) which provided that between January 31, 2005, and January 31, 2007, avocados may be imported into and distributed in all States except California, Florida, Hawaii, and that the boxes or crates in which avocados are shipped must be clearly marked with the statement ''Not for importation or distribution in CA, FL, and HI.''

Prior to the effective date of our November 2004 final rule, the regulations had required that the boxes or crates be marked ''Not for distribution in AL, AK, AZ, AR, CA, FL, GA, HI, LA, MS, NV, NM, NC, OK, OR, SC, TN, TX, WA, Puerto Rico, and all other U.S. Territories.'' When we amended the regulations to expand, from 31 to 50, the number of States (plus the District of Columbia) in which fresh Hass avocado fruit grown in approved orchards in approved municipalities in Michoacan, Mexico, may be distributed, we should not have removed that portion of the box marking requirement that pertained to Puerto Rico and U.S. Territories. The proposed and final rules only discussed importations into the 50 States and the District of Columbia, and the pest risk analysis that supported the proposed and final rules only evaluated the risks associated with the movement of the avocados into the 50 States and the District of Columbia.

Therefore, in this document we are amending § 319.56–2ff(a)(2), which describes the shipping restrictions that apply to the avocados, and § 319.56–2ff(c)(3), which describes the box marking requirements, in order to correct the November 2004 final rule's removal of the distribution limitations that apply to Puerto Rico and U.S. Territories.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Honey, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, we are amending 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. In § 319.56–2ff, paragraphs (a)(2) and (c)(3)(vii) are revised to read as follows:

§ 319.56–2ff Administrative instructions governing movement of Hass avocados from Michoacan, Mexico.

* * * * *

(a) * * *

(2) Between January 31, 2005, and January 31, 2007, the avocados may be imported into and distributed in all States except California, Florida, Hawaii, Puerto Rico, and U.S. Territories. After January 31, 2007, the avocados may be imported into and distributed in all States, but not Puerto Rico or any U.S. Territory.

* * * * *

(c) * * *

(3) * * *

(vii) The avocados must be packed in clean, new boxes, or clean plastic reusable crates. The boxes or crates must be clearly marked with the identity of the grower, packinghouse, and exporter. Between January 31, 2005, and January 31, 2007, the boxes or crates must be clearly marked with the statement ''Not for importation or distribution in CA, FL, HI, Puerto Rico, or U.S. Territories.'' After January 31, 2007, the boxes or crates must be clearly marked with the statement ''Not for importation or distribution in Puerto Rico or U.S. Territories.''

* * * * *

Done in Washington, DC, this 12th day of October 2006.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E6–17335 Filed 10–17–06; 8:45 am]

BILLING CODE 3410–34–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064—AD08

One-Time Assessment Credit

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is amending its assessments regulations to implement the one-time assessment credit required by the Federal Deposit Insurance Act (FDI Act), as amended by the Federal Deposit Insurance Reform Act of 2005 (Reform Act). The final rule covers: The aggregate amount of the one-time credit; the institutions that are eligible to receive credits; and how to determine the amount of each eligible institution's credit, which for some institutions may be largely dependent on how the FDIC defines ''successor'' for these purposes. The final rule also establishes the qualifications and procedures governing the application of assessment credits, and provides a reasonable opportunity for an institution to challenge administratively the amount of the credit.

EFFECTIVE DATE: The final rule is effective on November 17, 2006.

FOR FURTHER INFORMATION CONTACT: Munsell W. St. Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898–8967; Donna M. Saulnier, Senior Assessment Policy Specialist, Division of Finance, (703) 562–6167; or Joseph A. DiNuzzo, Counsel, Legal Division, (202) 898–7349.

SUPPLEMENTARY INFORMATION: This supplementary information section contains a discussion of the statutory basis for this rulemaking and the proposed rule published in May 2006, a summary of the comments received on the proposed rule, and the final rule, which responds to the comments.

I. Background

The Reform Act made numerous revisions to the deposit insurance assessment provisions of the FDI Act.[1] Specifically, the Reform Act amended Section 7(e)(3) of the Federal Deposit Insurance Act to require that the FDIC's Board of Directors (Board) provide by regulation an initial, one-time assessment credit to each ''eligible'' insured depository institution (or its

[1] The Reform Act was included as Title II, Subtitle B, of the Deficit Reduction Act of 2005, Public Law 109–171, 120 Stat. 9, which was signed into law by the President on February 8, 2006.

successor) based on the assessment base of the institution as of December 31, 1996, as compared to the combined aggregate assessment base of all eligible institutions as of that date (the 1996 assessment base ratio), taking into account such other factors as the Board may determine to be appropriate. The aggregate amount of one-time credits is to equal the amount that the FDIC could have collected if it had imposed an assessment of 10.5 basis points on the combined assessment base of the Bank Insurance Fund (BIF) and Savings Association Insurance Fund (SAIF) as of December 31, 2001. 12 U.S.C. 1817(e)(3).

An ''eligible'' insured depository institution is one that: was in existence on December 31, 1996, and paid a Federal deposit insurance assessment prior to that date; [2] or is a ''successor'' to any such insured depository institution. The FDI Act requires the Board to define ''successor'' for these purposes and provides that the Board ''may consider any factors as the Board may deem appropriate.'' The amount of a credit to any eligible insured depository institution must be applied by the FDIC to the deposit insurance assessments imposed on such institution that become due for assessment periods beginning after the effective date of the one-time credit regulations required to be issued within 270 days after enactment.[3] 12 U.S.C. 1817(e)(3)(D)(i).

There are three statutory restrictions on the use of credits. First, as a general rule, for assessments that become due for assessment periods beginning in fiscal years 2008, 2009, and 2010, credits may not be applied to more than 90 percent of an institution's assessment.[4] 12 U.S.C. 1817(e)(3)(D)(ii). (This 90 percent limit does not apply to 2007 assessments.) Second, for an institution that exhibits financial, operational or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not at least adequately capitalized (as defined pursuant to section 38 of the FDI Act) at the beginning of an assessment period, the amount of any credit that may be applied against the institution's assessment for the period may not exceed the amount the institution would have been assessed had it been assessed at the average rate for all institutions for the period. 12 U.S.C. 1817(e)(3)(E). And, third, if the FDIC is operating under a restoration plan to recapitalize the Deposit Insurance Fund (DIF) pursuant to section 7(b)(3)(E) of the FDI Act, as amended by the Reform Act, the FDIC may elect to restrict credit use; however, an institution must still be allowed to apply credits up to three basis points of its assessment base or its actual assessment, whichever is less. 12 U.S.C. 1817(b)(3)(E)(iii).

The one-time credit regulations must include the qualifications and procedures governing the application of assessment credits. These regulations also must include provisions allowing a bank or thrift a reasonable opportunity to challenge administratively the amount of credits it is awarded.[5] Any determination of the amount of an institution's credit by the FDIC pursuant to these administrative procedures is final and not subject to judicial review. 12 U.S.C. 1817(e)(4).

II. The Proposed Rule

As part of this rulemaking, the FDIC was required, among other things, to: Determine the aggregate amount of the one-time credit; determine the institutions that are eligible to receive credits; and determine the amount of each eligible institution's credit, which for some institutions may be largely dependent on how the FDIC defines ''successor'' for these purposes. The FDIC also must establish the qualifications and procedures governing the application of assessment credits, and provide a reasonable opportunity for an institution to challenge administratively the amount of the credit. The FDIC's determination after such challenge will be final and not subject to judicial review.

As set out more fully in the proposed rule,[6] the FDIC proposed to: (1) Rely on the 1996 assessment base figures contained in the Assessment Information Management System (AIMS) [7]; (2) define ''successor'' as the resulting institution in a merger or consolidation, while seeking comment on alternative definitions; (3) automatically apply each institution's credit against future assessments to the maximum extent allowed consistent with the limitations in the FDI Act; and (4) provide an appeals process for administrative challenges to the amounts of credits that culminates in review by the FDIC's Assessment Appeals Committee.

Shortly after publication of the proposed rule, the FDIC made available a searchable database with the FDIC's calculation of every institution's 1996 assessment base (if any) to give institutions the opportunity to review and verify both their 1996 assessment base and preliminary, estimated credit amount, as well as information related to mergers or consolidations to which it was a party.

The comment period for the proposed rule was extended to August 16, 2006, to allow all interested parties to consider the proposed rule while proposed rules on the designated reserve ratio and risk-based assessments were pending.

A. Aggregate Amount of One-Time Assessment Credit

The aggregate amount of the one-time assessment credit is $4,707,580,238.19, which was calculated by applying an assessment rate of 10.5 basis points to the combined assessment base of BIF and SAIF as of December 31, 2001. The FDIC proposed to rely on the assessment base numbers available from each institution's certified statement (or amended certified statement), filed quarterly and preserved in AIMS, which records the assessment base for each insured depository institution as of that

[2] Prior to 1997, the assessments that SAIF member institutions paid the SAIF were diverted to the Financing Corporation (FICO), which had a statutory priority to those funds. Beginning with enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA, Public Law 101–73, 103 Stat. 183) and ending with the Deposit Insurance Funds Act of 1996 (DIFA, Public Law 104–208, 110 Stat. 3009, 3009–479), FICO had authority, with the approval of the Board of Directors of the FDIC, to assess against SAIF members to cover anticipated interest payments, issuance costs, and custodial fees on FICO bonds. The FICO assessment could not exceed the amount authorized to be assessed against SAIF members pursuant to section 7 of the FDI Act, and FICO had first priority against the assessment. 12 U.S.C. 1441(f), as amended by FIRREA. Beginning in 1997, the FICO assessments were no longer drawn from SAIF. Rather, the FDIC began collecting a separate FICO assessment. 12 U.S.C. 1441(f), as amended by DIFA. Payments to SAIF prior to December 31, 1996, even if diverted to FICO, are considered deposit insurance assessments for purposes of the one-time assessment credit. The new law does not change the existing process through which the FDIC collects FICO assessments.

[3] Section 2109 of the Reform Act also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the dividend requirements, and assessments. The final rule on deposit insurance coverage was published on September 12, 2006, 71 FR 53547. The final rule on the dividend requirements is being published on the same day as this final rule. Final rules on the other matters are expected to be published in the near future.

[4] As proposed, the FDIC is interpreting a ''fiscal year'' as a calendar year.

[5] Similarly, for dividends under the FDI Act, as amended by the Reform Act, the regulations must include provisions allowing a bank or thrift a reasonable opportunity to challenge administratively the amount of dividends it is awarded. 12 U.S.C. 1817(e)(4).

[6] 71 FR 28808 (May 18, 2006).

[7] The current Assessment Information Management Systems (AIMS) contains records from quarterly reports of condition data from institutions with bank and thrift charters. The FFIEC Central Data Repository (FFIEC–CDR) for banks and the Thrift Financial Report for thrifts provide AIMS with the values of the deposit line items that are used in the calculation of an institution's assessment base.

date. AIMS is the FDIC's official system of records for determination of assessment bases and assessments due.

B. Determination of Eligible Insured Depository Institutions and Each Institution's 1996 Assessment Base Ratio

The FDIC must determine the assessment base of each eligible institution as of December 31, 1996, and any successor institutions, to determine the eligible institution's 1996 assessment base ratio. In making these determinations, the Board has the authority to take into account such factors as the Board may determine to be appropriate. 12 U.S.C. 1817(e)(3)(A).

As described in the proposed rule, the denominator of the 1996 assessment base ratio is the combined aggregate assessment base of all eligible insured depository institutions and their successors. The numerator of each eligible institution's 1996 assessment base ratio is its assessment base as of December 31, 1996, combined with the assessment base on December 31, 1996, of each institution (if any) to which it is a successor. An eligible insured depository institution is one in existence as of December 31, 1996, that paid a deposit insurance assessment prior to that date (or a successor to such institution).

1. Determination of Eligible Institutions

Similar to the determination of the aggregate amount of the credit, the FDIC proposed to use the December 31, 1996 assessment base for each institution, as it appears on the institution's certified statement or as subsequently amended and as recorded in AIMS, to identify eligible institutions. Those numbers reflect the bases on which institutions that existed on December 31, 1996, paid assessments. As of June 30, 2006, there were approximately 7,300 active insured depository institutions that may be eligible for the one-time assessment credit—that is, they were in existence on December 31, 1996, and had paid an assessment prior to that date or are a successor to such an institution.

a. Effect of Voluntary Termination or Failure

The FDIC identified institutions that voluntarily terminated their insurance or failed since December 31, 1996, which otherwise would have been considered eligible insured depository institutions for purposes of the one-time credit. Whether an institution that voluntarily terminated would have a successor would depend on the specific circumstances surrounding its termination. The FDIC proposed that an insured depository institution that has failed would not have a successor.

b. *De Novo* Institutions

The FDIC also identified institutions newly in existence as of December 31, 1996 (*de novo* institutions) that did not pay deposit insurance premiums prior to December 31, 1996. Under the statute, those institutions could not be eligible insured depository institutions for purposes of the one-time assessment credit. However, the FDIC proposed that certain *de novo* institutions, which did not directly pay assessments prior to December 31, 1996, but which acquired by merger or consolidation before that date another insured depository institution that had paid assessments, would be considered eligible insured depository institutions. The FDIC viewed those *de novo* institutions as having stepped into the shoes of the existing institution for purposes of determining eligibility for the one-time assessment credit, consistent with the proposed successor definition.

2. Definition of ''Successor''

Many institutions that existed at the end of 1996 no longer exist. Some have disappeared through merger or consolidation. In fact, it appears that approximately 4,000 institutions that were in existence on December 31, 1996, have since combined with other institutions. In addition, 38 institutions have failed and no longer exist, while the FDIC has to date identified approximately 100 institutions that voluntarily relinquished Federal deposit insurance coverage or had their coverage terminated. The FDIC does not maintain complete records on sales of branches or blocks of deposits, but various sources suggest that at least 1,400 and possibly over 1,800 branch or deposit transactions have occurred since 1996.

Section 7(e)(3)(F) of the FDI Act expressly charges the FDIC with defining ''successor'' by regulation for purposes of the one-time credit, and it provides the FDIC with broad discretion to do so. The Board may consider any factors it deems appropriate. The FDIC's proposed definition of ''successor'' reflected its consideration of what would be most consistent with the purpose of the one-time credit and what would be operationally viable. While a number of definitions of ''successor'' are possible in light of the discretion accorded the FDIC in defining the term, on balance, the FDIC concluded that the definition that focused on the institution and relied on traditional principles of corporate law was both more consistent with the purpose of the credit and more operationally viable.

For a number of reasons (discussed more fully in the proposed rule), the FDIC proposed to define ''successor'' for purposes of the one-time credit as the resulting institution in a merger or consolidation occurring after December 31, 1996. As proposed, the definition would not include a purchase and assumption transaction, even if substantially all of the assets and liabilities of an institution were acquired by the assuming institution. However, the FDIC requested comment on whether to include in this definition a regulatory definition of a *de facto* merger to recognize that the results of some transactions, which are not technically or legally mergers or consolidations, may largely mirror the results of a merger or consolidation. The FDIC also requested comment on a definition that would link credits to deposits, sometimes referred to as a ''follow-the-deposits'' approach.

If there is no successor to an institution that would have been eligible for the one-time assessment credit *before* the effective date of the final rule, because an otherwise eligible institution ceased to be an insured depository institution before that date, then the FDIC proposed that that portion of the aggregate one-time credit amount be redistributed among the eligible institutions. On the other hand, if there is no successor to an eligible insured depository institution that ceases to exist after the Board issues the final rule and allocates the one-time assessment credit among eligible insured depository institutions, it is proposed that that institution's credits expire unused.

C. Notification of 1996 Assessment Base Ratio and Credit Amount

Along with the publication of the proposed rule, the FDIC made available a searchable database provided through the FDIC's public Web site (*http://www.fdic.gov*) that shows each currently existing institution and its predecessors by merger or consolidation from January 1, 1997, onward, based on information contained in certified statements, AIMS, and the FDIC's Structure Information Management System (''SIMS'').[8] The database included corresponding December 31, 1996 assessment base

[8] SIMS maintains current and historical non-financial data for all institutions that is retrieved by AIMS to identify the current assessable universe for each quarterly assessment invoice cycle. SIMS offers institution-specific demographic data, including a complete set of information on merger or consolidation transactions. SIMS, however, does not contain complete information about deposit or branch sales.

amounts for each institution and its predecessors and preliminary estimates of the amount of one-time credit that the existing institution would receive based on the proposed definition of successor.

The database could be searched by institution name or insurance certificate number to ascertain which current institution (if any) would be considered a successor to an institution that no longer exists. Institutions had the opportunity to review this information, but were advised that this preliminary estimate could change, for example, because of a change in the definition of ''successor'' adopted in the final rule or because of a change to the information available to the FDIC for determining successorship.

As soon as practicable after the Board approves the final rule, the FDIC proposed to notify each insured depository institution of its 1996 assessment base ratio and share of the one-time assessment credit. The notice would take the form of a Statement of One-Time Credit (or Statement): Informing every institution of its current, preliminary 1996 assessment base ratio; itemizing the 1996 assessment bases to which the institution may now have claims pursuant to the successor rule based on existing successor information in the database; providing the preliminary amount of the institution's one-time credit based on that 1996 assessment base ratio as applied to the aggregate amount of the credit; and providing the explanation as to how ratios and resulting amounts were calculated generally. The FDIC proposed to provide the Statement of One-Time Credit through FDIC*connect* and by mail in accordance with existing practices for assessment invoices.

D. Requests for Review of Credit Amounts

As noted above, the statute requires the FDIC's credit regulations to include provisions allowing an institution a reasonable opportunity to challenge administratively the amount of its one-time credit. The FDIC's determination of the amount following any such challenge is to be final and not subject to judicial review.

The proposed rule largely paralleled the procedures for requesting revision of computation of a quarterly assessment payment as shown on the quarterly invoice with requests for review being considered by the Director of the Division of Finance and appeals of those decisions made to the FDIC's Assessment Appeals Committee (''AAC''). As with the notice of proposed rulemaking on assessment dividends,[9] the FDIC proposed shorter timeframes in the credit process so that requests for review could be resolved to allow application of credits against upcoming assessments to the extent possible. The FDIC further proposed to freeze temporarily the allocation of the credit amount in dispute for institutions involved in a challenge until the challenge is resolved. After determination of the request for review or appeal, if filed, appropriate adjustments would be reflected in the next quarterly invoice.

E. Using Credits

The FDIC proposed to track each institution's one-time credit amount and automatically apply an institution's credits to its assessment to the maximum extent allowed by law. For 2007 assessment periods, all credits available to an institution may be used to offset the institution's insurance assessment, subject to certain statutory limitations described below. For assessments that become due for assessment periods beginning in fiscal years 2008, 2009, and 2010, the FDI Act provides that credits may not be applied to more than 90 percent of an institution's assessment.

For an institution that exhibits financial, operational or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not adequately capitalized at the beginning of an assessment period, the amount of any credit that may be applied against the institution's assessment for the period may not exceed the amount the institution would have been assessed had it been assessed at the average assessment rate for all institutions for the period. The FDIC proposed to interpret the phrase ''average assessment rate'' to mean the aggregate assessment charged all institutions in a period divided by the aggregate assessment base for that period.

As described above, the FDIC further has the discretion to limit the application of the one-time credit when the FDIC establishes a restoration plan to restore the reserve ratio of the DIF to the range established for it.[10]

As the proposed rule recognized, credit amounts may not be used to pay FICO assessments pursuant to section 21(f) of the Federal Home Loan Bank Act, 12 U.S.C. 1441(f). The Reform Act does not affect the authority of FICO to impose and collect, with the approval of the FDIC's Board, assessments for anticipated interest payments, issuance costs, and custodial fees on obligations issued by FICO.

F. Transferring Credits

In addition to the transfer of credits to successors, the FDIC proposed to allow transfer of credits and adjustments to 1996 assessment base ratios by express agreement between insured depository institutions prior to the FDIC's final determination of an eligible insured depository institution's 1996 assessment base ratio and one-time credit amount pursuant to these regulations. Under the proposal, the FDIC would require the institutions to submit a written agreement signed by legal representatives of the involved institutions. Upon the FDIC's receipt of the agreement, appropriate adjustments would be made to the institutions' affected one-time credit amounts and 1996 assessment base ratios.

Similarly, after an institution's credit share has been finally determined and no request for review is pending with respect to that credit amount, the FDIC proposed to recognize an agreement between insured depository institutions to transfer any portion of the one-time credit from the eligible institution to another institution. With respect to these transactions occurring after the final determination of each eligible institution's 1996 assessment base ratio and share of the one-time credit, the FDIC proposed not to adjust the transferring institution's 1996 assessment base ratio.

III. Comments on the Proposed Rule

We received twenty-six comments on the proposed rule. Most of the comments focused to some extent on the definition of ''successor.''

Five institutions and one trade association supported the proposed definition of successor, which relies on traditional principles of corporate law. Five institutions appeared to support including a *de facto* merger rule to recognize purchase and assumption transactions that may be viewed by some as the functional equivalent of a merger or consolidation. One institution emphasized that such a rule would have to be narrowly crafted. Four industry trade associations supported adding a *de facto* merger rule. Six institutions and a trade association commented in favor of a definition that would link credits to deposits, arguing that assessments are paid on deposits and rights and responsibilities associated

[9] 71 *FR* 22804 (May 18, 2006).

[10] Section 2105 of the Reform Act, amending section 7(b)(3) of the FDI Act to establish a range for the reserve ratio of the DIF, will take effect on the date that final regulations implementing the legislation with respect to the designated reserve ratio become effective. Those regulations are required to be prescribed within 270 days of enactment. Reform Act Section 2109(a)(1).

with those deposits transfer when they are sold. One institution raised the question of so-called stripped charters, where one institution might acquire the assets and liabilities of another, while a third institution would merely merge with the charter of the acquired institution.

Two United States Senators filed a joint comment letter asking the FDIC to reexamine its definition of successor, expressing their concern that the proposed rule ''provides absolutely no opportunity for a bank that purchased deposits to receive credits for those deposits, whether deposits are easily traceable, or whether awarding credits to the selling bank would create a windfall for that selling bank and create a new free rider on the Fund.'' One institution requested that the FDIC reconsider the definitions of ''eligible insured depository institution'' and ''successor,'' as well as the redistribution of credits where no successor exists, to recognize the actual assessments paid before December 31, 1996, by institutions that no longer had the deposits on which those assessments were paid on December 31, 1996, the date established by the statute. A trade association commented that the time-frames for the request for review process should be extended to parallel those applicable to requests for review of assessments.

Six letters suggested that the FDIC phase in the one-time credit and some suggested three approaches for phasing in the application of credits—allowing institutions to use fifty percent of credits against assessments; allowing institutions to use a certain number of basis points of credit to offset assessments in any one year; or implementing a graduated credit schedule to offset assessments. These commenters argued that the proposal to apply credits to quarterly assessments to the maximum extent allowed by law would disproportionately adversely affect institutions chartered since 1996. One trade association supported the proposed rule, under which the FDIC would automatically offset quarterly assessments with the maximum amount of credits available and allowed by law. Another trade association suggested that the FDIC allow institutions to elect to restrict the application of their credits to budget for future expected expenses.

One institution took the position that credits should not expire unused if an institution terminated after the effective date of the final rule; rather, that institution recommended that any remaining credit from that institution be redistributed among all eligible institutions.

One institution opposed allowing the transfer of credits except to successors. Two trade associations supported the transferability described in the proposed rule. A trade association also opined that it was critical that the accounting treatment of these credits be determined before the effective date of the final rule and further offered its opinion that credits should not be considered assets or income.

All of the comment letters have been considered and are available on the FDIC's Web site, *http://www.fdic.gov/regulations/laws/federal/propose.html.*

IV. The Final Rule

Upon considering the comments on the proposed rule, the FDIC is adopting the final rule. Under the final rule, the FDIC will rely on the 1996 assessment base figures as contained in AIMS in determining the aggregate amount of the one-time assessment credit and each institution's share of that aggregate amount; define ''successor'' as the resulting institution in a merger or consolidation, as well as the acquiring institution under a *de facto* rule; automatically apply each institution's credit against future assessments to the maximum extent allowed by the statute; and provide an appeals process for administrative challenges to individual institution's credit amounts that culminates in review by the AAC.

A. Eligible Insured Depository Institutions and Their Successors

To be eligible to receive a share of the one-time assessment credit, an insured depository institution must have been in existence on December 31, 1996, and paid a deposit insurance assessment prior to that date or be a successor to such an institution. The statute, in essence, takes a snapshot of the industry as of year-end 1996, and uses that as a proxy to recognize the assessments that had been paid by some institutions to recapitalize the deposit insurance funds at that time. Because it is a proxy, there may not be perfect alignment between institutions that paid significant assessments over years and their credit amounts.

As the comments reflect, the principal issue in this rulemaking has been the definition of ''successor.'' In the proposed rule, the FDIC proposed to define successor for purposes of the one-time credit as the resulting institution in a merger or consolidation occurring after December 31, 1996. We requested specific comment on whether to include in the definition of ''successor'' a regulatory definition of a *de facto* merger to recognize that the results of some transactions, which are not technically or legally mergers or consolidations, may largely mirror the results of a merger or consolidation. A number of approaches were possible, and the FDIC carefully considered the alternatives presented in the proposed rule and the comments on them. The final rule defines successor as (1) the resulting institution in a merger or consolidation or (2) as an insured depository institution that acquired part of another insured depository institution's 1996 assessment base ratio under a *de facto* rule, as described below.

The FDIC believes this definition is consistent with the purpose of the one-time credit—that is, to recognize the contributions that certain institutions made to capitalize the Bank Insurance Fund and Savings Association Insurance Fund, now merged into the Deposit Insurance Fund. Thus, a resulting institution in a merger occurring after December 31, 1996, will be considered a successor to an eligible insured depository institution. This definition also is consistent with traditional principles of corporate law. 15 William Meade Fletcher *et al.*, Fletcher Cyclopedia of the Law of Private Corporations §§ 7041–7100 (perm. ed., rev. vol. 1999).

Under the statute, Congress has provided the FDIC with broad discretion to define ''successor'' considering any factors that the Board deems appropriate. Several commenters noted, and the Board recognizes, the consolidation of the industry, the numerous transactions that have occurred since 1996, and that parties would not have taken into account future credits when structuring transactions. Accordingly, under the final rule, ''successor'' is defined as the acquiring, assuming or resulting institution in a merger [11] or the acquiring institution under a *de facto* rule. The *de facto* rule applies to any transaction in which an insured depository institution assumes substantially all of the deposit liabilities and acquires substantially all of the assets of any other insured depository institution.

For these purposes, the FDIC considers an assumption and acquisition of at least 90 percent of the transferring institution's deposit liabilities and assets at the time of

[11] The definition of merger in the final rule specifically excludes transactions in which an insured depository institution either directly or indirectly acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution where there is not a legal merger or consolidation of the two insured depository institutions.

transfer as substantially all of that institution's assets and deposit liabilities. Any successor institution qualifying under that threshold would be entitled to a pro rata share, based on the deposit liabilities assumed, of the transferring institution's remaining 1996 assessment base ratio at the time of the transfer.

The FDIC recognizes that including a *de facto* rule in the definition of successor departs, to a certain extent, from the clear, bright line that a strictly applied merger definition would provide. However, in keeping with the comments we received in favor of defining mergers to include *de facto* mergers, the FDIC believes this approach is fairer than excluding *de facto* transactions from the definition of successor. It is also consistent with Congressional intent in giving the FDIC broad discretion to define successor institutions for purposes of the one-time assessment credit. As some commenters point out, the insurance fund benefited from certain of these transactions by avoiding failure of an insured depository institution and associated losses.

The FDIC believes that the merger and consolidation approach for successor is the most consistent with the purpose of the one-time assessment credit; however, a strict merger definition would exclude certain transactions that are also consistent with the purpose of the one-time credit. A *de facto* rule recognizes that a transfer of at least 90 percent of an institution's assets and deposit liabilities indicates a substantial divestiture of the transferring institution's business. We recognize some institutions that assumed deposit liabilities would not qualify, but a lower threshold would be less consistent with the purpose of the one-time credit in recognizing past contributions by institutions.

Although the FDIC does not have records evidencing all transactions that would qualify under the *de facto* rule, we expect these situations to be limited and, as some commenters noted, the acquiring institutions in such transactions should be able to provide supporting documents to the FDIC. We note, however, that institutions will have thirty days from the effective date of the final rule to advise the FDIC if they disagree with the computation of the credit amount, or their claim will be barred. It is important to have a final determination regarding any *de facto* rule credit claims in order to determine the amounts institutions will be entitled to under the one-time assessment credit.

Some commenters suggested a more expansive definition of successor up to and including the very inclusive ''follow the deposits.'' Ultimately, the FDIC believes, for the reasons stated below, that if the term ''successor'' were expanded to include deposit acquisitions other than through merger or under the *de facto* rule, it would become very difficult to distinguish on a principled basis who should be included and who should be excluded, and that a ''follow-the-deposits'' approach which brings with it a potentially large administrative complication is incompatible with the need to timely and efficiently administer the credit.

As noted above, the FDIC has significant discretion under the statute to define ''successor'' for these purposes, and a single, clear, easily administered Federal standard is essential to allow the FDIC to implement and administer the one-time credit requirement in a timely and efficient manner. As one trade association wrote, institutions on ''opposite sides of deposit sales transactions * * * have strong and legitimate arguments for why they would be the successor.'' In contrast, if a ''follow-the-deposits'' approach were adopted, because the aggregate one-time assessment credit is a finite pool, disputes over credits resulting from deposit/branch purchases would have to be identified and to some extent resolved before the universe of eligible insured depository institutions could even be identified, which is essential to determining each institution's share based on its 1996 assessment base as adjusted for successorship. Under that scenario, until the 1996 assessment base for all eligible institutions was finalized, use of credits could be delayed and administration would be complicated. Record deposit growth could further complicate these determinations because, in addition to tracing deposits sometimes through numerous transactions, the FDIC might need to account for deposit growth over time attributable to the transferring deposits. One of the trade groups that supports the ''follow the deposits'' approach acknowledged that '' 'following the deposits' significantly complicates the FDIC's job of allocating the credit * * *.''

Some commenters suggest that the merger rule ''discriminates'' and ''arbitrarily places institutions which acquired deposits through asset acquisition at a competitive disadvantage based merely on the method by which they acquired deposits.'' The FDIC disagrees with that characterization. The adopted definition recognizes past payments made by depository institutions to build the insurance funds. By providing the credit to depository institutions that actually paid the assessments or the institution resulting from their merger or consolidation into another insured institution, the final rule ensures that credits are awarded to the entity that bore the financial burden of recapitalizing the funds, either by directly paying into the funds or acquiring the institutions that did. Similarly, a successor under the *de facto* rule may be viewed as acquiring substantially all of the business of the transferring institution.

Some commenters that would benefit from a ''follow the deposits'' approach argue that the adopted definition of ''successor'' is not consistent with congressional intent. Contrary to the contention of some commenters, Congress's broad delegation of authority to the FDIC to define ''successor'' does not evidence Congressional intent either to expand or contract the group of qualified institutions. Rather, the broad delegation ensured that the FDIC could consider the full range of facts and circumstances in developing a definition of successor—which we have done.

The adopted definition is well within the broad discretion Congress gave the FDIC to implement the statute and with our understanding of the intent. The statute uses the term ''eligible insured depository institution'' and defines it to include those that paid assessments prior to December 31, 1996. The legislative history is replete with statements indicating that credits were intended to recognize those institutions that recapitalized the funds. In testimony before Congress, then-Chairman Powell stated, ''Institutions that never paid premiums would receive no assessment credit.'' Testimony of Chairman Powell before the Senate Committee on Banking, Housing and Urban Affairs (April 23, 2002); see also Testimony of Chairman Powell before the House Financial Services Committee (October 17, 2001) (indicating that an acquiring institution would get credit for past assessments paid by the acquired institution). In a statement before the House, one of the co-sponsors of the legislation stated, ''We have reforms in this bill that compensate banks for the adverse effect of these so-called free riders. We give transition assessment credits, recognizing the contribution of those banks to the insurance reserves that they made during the early and mid-1990s, and those credits will offset future premiums for all but the newest and the most recent new institutions and also those fast-growing institutions.'' Statement of Rep. Spencer Bachus, 148 Cong. Rec. H 2799 (daily ed. May 21, 2002). Also in a statement before the House, another co-sponsor of the legislation stated, ''The bill includes a mechanism for determining credits for past contributions to the insurance funds * * *. This is a very, very important provision as a matter of fairness to institutions that recapitalized the funds.'' Statement of Rep. Carolyn Maloney, 151 Cong. Rec. 2019, at 8–9 (2005).

The successor definition adopted in this rule responds to comments supportive of a *de facto* merger rule by providing an opportunity for an acquirer of all or substantially all deposits to share in the credit for those deposits, absent a merger or consolidation.

As indicated in the proposed rule, if there is no successor to an institution that would have been eligible for the one-time assessment credit before the effective date of the final rule, because an otherwise eligible institution ceased to be an insured depository institution before that date, then that portion of the aggregate one-time credit amount will be redistributed among the eligible institutions. On the other hand, if there is no successor to an eligible insured depository institution that ceases to exist after the effective date of the final rule, that institution's credits will expire unused.

B. Notice of Credit Amount

As soon as practicable after the publication date of the final rule, the FDIC will notify each insured depository institution of its 1996 assessment base ratio and preliminary determination of its share of the one-time assessment credit, based on the information derived from its official system of records (AIMS). The Statement of One-Time Credit: Will inform each institution of its current, preliminary 1996 assessment base ratio; itemize the 1996 assessment bases to which the institution is believed to have claims pursuant to the definition of successor; provide the preliminary amount of the institution's one-time credit based on the institution's 1996 assessment base ratio as applied to the aggregate amount of the credit; and explain how the ratios and resulting amounts were calculated generally. The FDIC will provide the Statement through FDIC*connect* and by mail in accordance with existing practices for assessment invoices.

After the initial notification by the Statement described above, periodic updated notices will be provided to reflect the adjustments that may be made up or down as a result of requests for review of credit amounts, as well as subsequent adjustments reflecting the application of credits to assessments and any appropriate adjustment to an institution's 1996 assessment base ratio due to a subsequent merger or consolidation. If the FDIC's responses to individual institutions' requests for review of their initial credit amount are not finalized prior to the invoices for collection of assessments for the first calendar quarter of 2007, the FDIC will freeze the credit amounts in dispute while making any credits not in dispute available for use. From that point on, an individual institution's credit share might increase, but it should not generally decrease except when its credits are used or transferred.

Adjustments to credits would be included with each quarterly assessment invoice until an institution's credits have been exhausted. The initial Statement and any subsequent updates notices or assessment invoices advising of an adjustment to the assessment base ratio would also advise institutions of their right to challenge the calculation and the procedures to follow.

C. Requests for Review Involving Credits

Within 30 days from the effective date of the final rule (or an adjusted invoice), an institution may request review if—

(1) It disagrees with the FDIC's determination of eligibility or ineligibility for the credit;

(2) It disagrees with the computation of the credit amount on the initial Statement or any subsequent invoice; or

(3) It believes that the Statement, an updated notice, or a subsequently updated invoice does not fully or accurately reflect appropriate adjustments to the institution's 1996 assessment base ratio.

One commenter requested that this time frame be extended to parallel the assessment appeals process. Because institutions have had access to the online search tool since May, the FDIC does not believe the 30-day deadline for requests for review will be overly burdensome. In addition, compressing the schedule for reviews is necessary to resolve as many requests as possible before the collection of assessments for the first calendar quarter of 2007, thereby allowing most institutions to offset those assessments with available credits.

The request for review must be filed with the Division of Finance and be accompanied by any documentation supporting the institution's claim. If an institution does not submit a timely request for review, the institution is barred from subsequently requesting review of its one-time assessment credit amount.

In addition, the requesting institution must identify all other institutions of which it knew or had reason to believe would be directly and materially affected by granting the request for review and provide those institutions with copies of the request for review and supporting documentation, as well as the FDIC's procedures for these requests for review. In addition, the FDIC will also make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified. These institutions then have 30 days to submit a response and any supporting documentation to the FDIC's Division of Finance, copying the institution making the original request for review. If an institution identified and notified through this process does not submit a timely response, that institution would be: (1) Foreclosed from subsequently disputing the information submitted by any other institution on the transaction(s) at issue in the review process; and (2) foreclosed from any appeal of the decision by the Director of the Division of Finance (discussed below).

Upon receipt of a request for review or a response from a potentially affected institution, the FDIC also may request additional information as part of its review and require the institution to supply that information within 21 days of the date of the FDIC's request for additional information. The FDIC will freeze temporarily the amount of the proposed credit in controversy for the institutions involved in the request for review until the request is resolved.

The final rule requires a written response from the FDIC's Director of the Division of Finance (Director), or his or her designee, which notifies the requesting institution and any materially affected institutions of the determination of the Director as to whether the requested change is warranted, whenever feasible: (1) Within 60 days of receipt by the FDIC of the request for revision; (2) if additional institutions have been notified by the FDIC, within 60 days of the last response; or (3) if additional information has been requested by the FDIC, within 60 days of receipt of any additional information due to such request, whichever is later.

The requesting institution, or an institution materially affected by the Director's decision, that disagrees with that decision may appeal its credit determination to the AAC. The final rule extends the time for filing an appeal; an appeal to the AAC must be filed within 30 calendar days from the date of the Director's written determination. Notice of the procedures applicable to appeals will be included with that written determination. The AAC's determination will be final and not subject to judicial review.

As noted in the proposed rule, the FDIC believes that a number of challenges may arise in connection with the distribution of the one-time assessment credit, in large part because many transactions occurred after 1996 and before the Reform Act provided for a one-time credit, and because this will be the first time that an institution's 1996 assessment base ratio is calculated. Once those challenges are resolved, and each institution's 1996 assessment base ratio for purposes of its one-time credit share is established, unforeseen circumstances or issues may lead to other challenges of credit share, and administrative procedures will remain in place to address those challenges.

Once the Director or the AAC, as appropriate, has made the final determination, the FDIC will make appropriate adjustments to credit amounts or shares consistent with that determination and correspondingly update each affected institution's next invoice. Adjustments to credit amounts will not be applied retroactively to reduce or increase prior period assessments.

D. Application or Use of Credits

The one-time assessment credits offset the collection of deposit insurance assessments beginning with the collection of assessments for the first assessment period of 2007. Under the final rule, the FDIC will track each institution's one-time credits and automatically apply them to that institution's assessment to the maximum extent allowed by law. For 2007 assessment periods, all credits available to an institution may be used to offset the institution's insurance assessment, subject to certain statutory limitations described below. For the following three years (2008, 2009, and 2010), the final rule, consistent with the statute, provides that credits may not be applied to more than 90 percent of an institution's assessment. Assuming that an institution has sufficient credits, those credits will automatically apply to 90 percent of that institution's assessment, subject to the two other statutory limitations on usage.[12]

By statute, for an institution that exhibits financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not adequately capitalized at the beginning of an assessment period, the amount of any credit that may be applied against that institution's assessment for the period may not exceed the amount the institution would have been assessed had it been assessed at the average assessment rate for all institutions for the period. The final rule interprets ''average assessment rate'' to mean the aggregate assessment charged all institutions in a period divided by the aggregate assessment base for that period.

The final statutory limit on the use of credits may be imposed by the FDIC in a restoration plan when the reserve ratio falls below 1.15 percent of estimated insured deposits. The FDIC's discretion to limit the use of credits during that period is, however, circumscribed by the statute. During the time that a restoration plan is in effect, the FDIC may elect to limit the use of credits, but an institution with credits could apply them against any assessment imposed on an institution for any assessment period in an amount equal to the lesser of (1) the amount of the assessment, or (2) the amount equal to three basis points of the institution's assessment base.

Five letters on behalf of *de novo* institutions suggest that the FDIC should phase in the use of credits or allow credits to offset assessments only on a graduated scale—that is, the FDIC should, in some manner, further limit the use of credits over the next few years. These commenters argue that, if the credit regulation is implemented as proposed, ''it would have an immediate negative impact on rates paid on consumer savings accounts by new growth institutions because they will be required to bear the burden on the cost of deposit insurance not just for their own institution, but also for utilizing assessment credits.'' In the FDIC's view, any such impact would be short-term. Moreover, the purpose of the credits, as previously discussed, is to recognize past payments by depository institutions to build the fund, so, by definition, institutions that did not pay assessments will be treated differently. As these commenters acknowledge, the proposal to apply credits against assessments to the maximum extent allowed by law is easily understood and simple to administer. In addition, the better reading of the statute indicates that there was no congressional intent to allow the FDIC to restrict further the use of credits, except in specifically enumerated circumstances. The FDI Act, as amended by the Reform Act, requires the FDIC to apply credit amounts to future assessments, mandates certain limits on the use of credits at specific times or in specific circumstances, and expressly provides the FDIC with the discretion to restrict the use of credits only during a restoration plan and only to a limited extent. This reading of the statute is more consistent with the intent of the one-time credit (also referred to as a ''transitional credit'' in the Conference Report on the legislation[13]), which, as noted above, was to recognize the contributions of certain institutions to capitalize the DIF.

One commenter recommended that institutions be allowed to adjust their use of credits to budget for future expected expenses, so that if assessments climb significantly higher than the proposed base rates, institutions could choose to pay smaller assessments over time rather than large assessments all at once as credits are completely exhausted. The Board believes this flexibility in using credits would be undesirable because of its potential operational complexities for the FDIC. More importantly, the one-time credit is not interest bearing; therefore, application of the credit against an institution's future assessments other than to the maximum extent allowed consistent with the limitations in the FDI Act will reduce the economic benefit of the credit to the institution.

In response to the comment on the characterization of credits for accounting purposes, the FDIC concurs that the determination and allocation of the one-time assessment credit to eligible insured depository institutions does not result in the recognition of an asset or income by these institutions, for accounting purposes. The FDIC does not believe that the one-time credit meets the characteristics of an asset described in Statement of Financial Accounting Concepts No. 6, *Elements of Financial Statements*. In this regard, the reduction in an institution's future insurance assessment payments from the application of the one-time credit does not represent a cash inflow to the institution, but rather represents contingent future relief from future cash outflows. The timing and ultimate recoverability of the one-time credit is not completely within the control of an eligible institution and no transaction or other event will have occurred at the date when the FDIC notifies the institution of the amount of its credit

[12] However, this rule will not affect or apply to deposit insurance assessment adjustments for assessment periods beginning before 2007 when these adjustments are made prior to the assessments imposed prior to the effective date of this rule.

[13] *See* H.R. Rep. No. 109–362, at 197 (2005).

that gives rise to the institution's right to or control of the benefit. The benefit is contingent on a future event, the payment of future insurance assessments. Moreover, the amount of benefit to an institution is dependent on the assessment rates charged by the FDIC and the applicability of the statutory restrictions on the use of the one-time credit, which is not interest-bearing.

Credit amounts may not be used to pay FICO assessments.[14] The Reform Act does not affect the authority of FICO to impose and collect, with the approval of the FDIC's Board, assessments for anticipated interest payments, issuance costs, and custodial fees on obligations issued by FICO.

E. Transfer of Credits

In addition to the transfer of credits to successors, the final rule allows transfers of credits and adjustments to 1996 assessment base ratios by express agreement between insured depository institutions prior to the FDIC's final determination of an eligible insured depository institution's 1996 assessment base ratio and one-time credit amount pursuant to this final rule. While the statute does not expressly address transferability, the final rule recognizes that it is possible that such agreements might already be part of deposit transfer contracts drafted in anticipation of deposit insurance reform legislation, which was pending in Congress over several years. Alternatively, institutions involved in a dispute over successorship, their 1996 assessment base ratio, and their shares of the one-time credit might reach a settlement over the disposition of the one-time credit. Given the FDIC's role in administering credits, it is most efficient to allow the FDIC to recognize these contractual provisions or settlements. In either case, for the FDIC to recognize the transfer, the final rule requires the institutions to notify the FDIC and submit a written agreement signed by legal representatives of the involved institutions. The agreement must include documentation that each representative has the legal authority to bind the institution. Upon the FDIC's receipt of the agreement, appropriate adjustments will be made to the institutions' affected one-time credit amounts and 1996 assessment base ratios. These adjustments will be reflected with the next quarterly assessment invoice, so long as the institutions submit the written agreement at least 10 days prior to the FDIC's issuance of the next invoices.

Similarly, after an institution's credit share has been finally determined and no request for review is pending with respect to that credit amount, the FDIC will recognize an agreement between insured depository institutions to transfer any portion of the one-time credit from an eligible institution to another institution. Nothing in the statute suggests that such transfers are precluded. In addition, no compelling reasons to prevent such transfers have been raised by the commenters. Because credits do not earn interest, there may be some interest among eligible insured depository institutions to sell credits that could not otherwise be used promptly. The same rules for notification to the FDIC and adjustments to invoices would apply as under the prior discussion, except that the FDIC will not adjust institutions' 1996 assessment base ratios. Except as provided in the preceding paragraph, adjustments to 1996 ratios will be made only to reflect mergers or consolidations occurring after the effective date of these regulations.

V. Regulatory Analysis and Procedure

Plain Language

Section 722 of the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. 6801 *et seq.*, requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The proposed rule requested comments on how the rule might be changed to reflect the requirements of GLBA. No GLBA comments were received.

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant impact on a substantial number of small entities or prepare an initial flexibility analysis of the proposal and publish the analysis for comment. *See* U.S.C. 603–605. Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of ''rule'' for purposes of the RFA. 5 U.S.C. 601. The one-time assessment credit rule relates directly to the rates imposed on insured depository institutions for deposit insurance, as they will offset future deposit insurance assessments. Nonetheless, the FDIC has voluntarily undertaken an initial and final regulatory flexibility analysis of the final rule.

Pursuant to 5 U.S.C. 605(b), the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small businesses within the meaning of the RFA. No comments on this issue were received. The final rule affects all ''eligible'' insured depository institutions. Of the approximately 8,790 insured depository institutions as of June 30, 2006, approximately 5,269 institutions fell within the definition of ''small entity'' in the RFA—that is, having total assets of no more than $165 million. Approximately 4,280 small institutions appear to be eligible for the one-time credit under the FDI Act definition of ''eligible insured depository institution.'' These institutions would have approximately $239 million in one-time credits out of a total of approximately $4.7 billion in one-time credits, given the FDI Act definition of ''eligible insured depository institution'' and the definition of ''successor'' in this rulemaking.[15] These one-time credits represent approximately 9.5 basis points of the combined assessment base of eligible small institutions as of June 30, 2006. Assuming, for purposes of illustration, that small institutions were charged an average annual assessment rate of 2 basis points, these one-time credits would last, on average, approximately 4.75 years. Clearly, if small institutions are charged a higher average annual assessment rate, given the final rule's requirement that credits be applied to assessment payments to the maximum extent allowed by law, the one-time credits would not last as long. Not all small institutions will benefit from one-time credits. New institutions, in particular, will not have credits unless they are a successor to an eligible institution or have purchased them. Most small, eligible institutions, however, would benefit to some extent from the final rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection

[14] *See* section 21(f) of the Federal Home Loan Bank Act, 12 U.S.C. 1441(f).

[15] The present value of these one-time credits depends upon when they are used, which in turn depends on the assessment rates charged. The one-time credits do not earn interest; therefore, the higher the assessment rate charged—and the faster credits are used—the greater their present value. These one-time assessment credits are transferable, which could increase their present value.

occurs when an institution participates in a transaction that results in the transfer of one-time credits or an institution's 1996 assessment base, as permitted under the final rule, and seeks the FDIC's recognition of that transfer. Institutions are required to notify the FDIC of these transactions so that the FDIC can accurately track the transfer of credits, apply available credits appropriately against institutions' deposit insurance assessments, and determine an institution's 1996 assessment base if the transaction involved both the base and the credit amount. The need for credit transfer information will expire when the credit pool has been exhausted. Moreover, it is expected that most transactions will occur during the first year.

The FDIC solicited public comment on this information collection in accordance with 44 U.S.C. 3506(c)(2)(B). No comments were received on this information collection. The FDIC also submitted the information collection to OMB for review in accordance with 44 U.S.C. 3507(d). The OMB has approved the information collection under control number 3065–0151.

Respondents: Insured depository institutions.

Frequency of response: Occasional.

Annual burden estimate:

Number of responses: 200–500 during the first year with fewer than 10 per year thereafter.

Average number of hours to prepare a response: 2 hours.

Total annual burden: 400–1,000 hours the first year, and fewer than 100 hours thereafter.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a ''major rule'' within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule may be reviewed.

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, Banking, Savings associations.

Authority and Issuance

■ For the reasons set forth in the preamble, the FDIC is amending chapter III of title 12 of the Code of Federal Regulations as follows:

■ 1. Revise subpart B, consisting of §§ 327.30 through 327.36, to read as follows:

PART 327—ASSESSMENTS

Subpart B—Implementation of One-Time Assessment Credit

Sec.

327.30 Purpose and scope.
327.31 Definitions.
327.32 Determination of aggregate credit amount.
327.33 Determination of eligible institution's credit amount.
327.34 Transferability of credits.
327.35 Application of credits.
327.36 Requests for review of credit amount.

Subpart B—Implementation of One-Time Assessment Credit

Authority: 12 U.S.C. 1817(e)(3).

§ 327.30 Purpose and scope.

(a) *Scope.* This subpart B of part 327 implements the one-time assessment credit required by section 7(e)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(e)(3) and applies to insured depository institutions.

(b) *Purpose.* This subpart B of part 327 sets forth the rules for:

(1) Determination of the aggregate amount of the one-time credit;

(2) Identification of eligible insured depository institutions;

(3) Determination of the amount of each eligible institution's December 31, 1996 assessment base ratio and one-time credit;

(4) Transferability of credit amounts among insured depository institutions;

(5) Application of such credit amounts against assessments; and

(6) An institution's request for review of the FDIC's determination of a credit amount.

§ 327.31 Definitions.

For purposes of this subpart and subpart C:

(a) The *average assessment rate* for any assessment period means the aggregate assessment charged all insured depository institutions for that period divided by the aggregate assessment base for that period.

(b) *Board* means the Board of Directors of the FDIC.

(c) *De facto rule* means any transaction in which an insured depository institution assumes substantially all of the deposit liabilities and acquires substantially all of the assets of any other insured depository institution at the time of the transaction.

(d) An *eligible insured depository institution:*

(1) Means an insured depository institution that:

(i) Was in existence on December 31, 1996, and paid a deposit insurance assessment before December 31, 1996; or

(ii) Is a successor to an insured depository institution referred to in paragraph (d)(1)(i) of this section; and

(2) does not include an institution if its insured status has terminated as of or after the effective date of this regulation.

(e) *Merger* means any transaction in which an insured depository institution merges or consolidates with any other insured depository institution. Notwithstanding part 303, subpart D, for purposes of this subpart B and subpart C of this part, *merger* does not include transactions in which an insured depository institution either directly or indirectly acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution, but there is not a legal merger or consolidation of the two insured depository institutions.

(f) *Resulting institution* refers to the acquiring, assuming, or resulting institution in a merger.

(g) *Successor* means a resulting institution or an insured depository institution that acquired part of another insured depository institution's 1996 assessment base ratio under paragraph 327.33(c) of this subpart under the *de facto* rule.

§ 327.32 Determination of aggregate credit amount.

The aggregate amount of the one-time credit shall equal $4,707,580,238.19.

§ 327.33 Determination of eligible institution's credit amount.

(a) Subject to paragraph (c) of this section, allocation of the one-time credit shall be based on each eligible insured depository institution's 1996 assessment base ratio.

(b) Subject to paragraph (c) of this section, an eligible insured depository institution's 1996 assessment base ratio shall consist of:

(1) Its assessment base as of December 31, 1996 (adjusted as appropriate to reflect the assessment base of December 31, 1996, of all institutions for which it is the successor), as the numerator; and

(2) The combined aggregate assessment bases of all eligible insured depository institutions, including any successor institutions, as of December 31, 1996, as the denominator.

(c) If an insured depository institution is a successor to an eligible insured depository institution under the *de facto* rule, as defined in paragraph 327.31(c) of this subpart, the successor and the eligible insured depository institution will divide the eligible insured depository institution's 1996 assessment base ratio pro rata, based on the deposit liabilities assumed in the transaction. In any subsequent transaction involving an insured depository institution that previously engaged in a transaction to which the *de facto* rule applied, the insured depository institution may not be deemed to have transferred more than its remaining 1996 assessment base ratio. If the transferring institution is no longer an insured depository institution after the transfer, the last successor will acquire the transferring institution's remaining 1996 assessment base ratio.

§ 327.34 Transferability of credits.

(a) Any remaining amount of the one-time assessment credit and the associated 1996 assessment base ratio shall transfer to a successor of an eligible insured depository institution.

(b) Prior to the final determination of its 1996 assessment base and one-time assessment credit amount by the FDIC, an eligible insured depository institution may enter into an agreement to transfer any portion of such institution's one-time credit amount and 1996 assessment base ratio to another insured depository institution. The parties to the agreement shall notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The adjustment to credit amount and the associated 1996 assessment base ratio shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement.

(c) An eligible insured depository institution may enter into an agreement after the final determination of its 1996 assessment base ratio and one-time credit amount by the FDIC to transfer any portion of such institution's one-time credit amount to another insured depository institution. The parties to the agreement shall notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The adjustment to the credit amount shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement.

§ 327.35 Application of credits.

(a) Subject to the limitations in paragraph (b) of this section, the amount of an eligible insured depository institution's one-time credit shall be applied to the maximum extent allowable by law against that institution's quarterly assessment payment under subpart A of this part, until the institution's credit is exhausted.

(b) The following limitations shall apply to the application of the credit against assessment payments.

(1) For assessments that become due for assessment periods beginning in calendar years 2008, 2009, and 2010, the credit may not be applied to more than 90 percent of the quarterly assessment.

(2) For an insured depository institution that exhibits financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not at least adequately capitalized (as defined pursuant to section 38 of the Federal Deposit Insurance Act) at the beginning of an assessment period, the amount of the credit that may be applied against the institution's quarterly assessment for that period shall not exceed the amount that the institution would have been assessed if it had been assessed at the average assessment rate for all insured institutions for that period. The FDIC shall determine the average assessment rate for an assessment period based upon its best estimate of the average rate for the period. The estimate shall be made using the best information available, but shall be made no earlier than 30 days and no later than 20 days prior to the payment due date for the period.

(3) If the FDIC has established a restoration plan pursuant to section 7(b)(3)(E) of the Federal Deposit Insurance Act, the FDIC may elect to restrict the application of credit amounts, in any assessment period, up to the lesser of:

(i) The amount of an insured depository institution's assessment for that period; or

(ii) The amount equal to 3 basis points of the institution's assessment base.

§ 327.36 Requests for review of credit amount.

(a)(1) As soon as practicable after the publication date of this rule, the FDIC shall notify each insured depository institution by FDIC*connect* or mail of its 1996 assessment base ratio and credit amount in a Statement of One-Time Credit (''Statement''), if any. An insured depository institution may submit a request for review of the FDIC's determination of the institution's 1996 assessment base ratio or credit amount as shown on the Statement within 30 days after the effective date of this rule. Such review may be requested if:

(i) The institution disagrees with a determination as to eligibility for the credit that relates to that institution's credit amount;

(ii) The institution disagrees with the calculation of the credit as stated on the Statement; or

(iii) The institution believes that the 1996 assessment base ratio attributed to the institution on the Statement does not fully or accurately reflect its own 1996 assessment base or appropriate adjustments for successors.

(2) If an institution does not submit a timely request for review, that institution is barred from subsequently requesting review of its credit amount, subject to paragraph (e) of this section.

(b)(1) An insured depository institution may submit a request for review of the FDIC's adjustment to the credit amount in a quarterly invoice within 30 days of the date on which the FDIC provides the invoice. Such review may be requested if:

(i) The institution disagrees with the calculation of the credit as stated on the invoice; or

(ii) The institution believes that the 1996 assessment base ratio attributed to the institution due to the adjustment to the invoice does not fully or accurately reflect appropriate adjustments for successors since the last quarterly invoice.

(2) If an institution does not submit a timely request for review, that institution is barred from subsequently requesting review of its credit amount, subject to paragraph (e) of this section.

(c) The request for review shall be submitted to the Division of Finance and shall provide documentation sufficient to support the change sought by the institution. At the time of filing with the FDIC, the requesting institution shall notify, to the extent practicable, any other insured depository institution that would be directly and materially affected by granting the request for review and provide such institution with copies of the request for review, the supporting documentation, and the FDIC's procedures for requests under this subpart. In addition, the FDIC also shall make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified.

(d) During the FDIC's consideration of the request for review, the amount of credit in dispute shall not be available for use by any institution.

(e) Within 30 days of being notified of the filing of the request for review, those institutions identified as potentially affected by the request for review may submit a response to such request, along with any supporting documentation, to the Division of Finance, and shall provide copies to the requesting institution. If an institution that was notified under paragraph (c) does not submit a response to the request for review, that institution may not:

(1) Subsequently dispute the information submitted by other institutions on the transaction(s) at issue in the review process; or

(2) Appeal the decision by the Director of the Division of Finance.

(f) If additional information is requested of the requesting or affected institutions by the FDIC, such information shall be provided by the institution within 21 days of the date of the FDIC's request for additional information.

(g) Any institution submitting a timely request for review will receive a written response from the FDIC's Director of the Division of Finance, (or his or her designee), notifying the requesting and affected institutions of the determination of the Director as to whether the requested change is warranted. Notice of the procedures applicable to appeals under paragraph (h) of this section will be included with the Director's written determination. Whenever feasible, the FDIC will provide the institution with the aforesaid written response the later of:

(1) Within 60 days of receipt by the FDIC of the request for revision;

(2) If additional institutions have been notified by the requesting institution or the FDIC, within 60 days of the date of the last response to the notification; or

(3) If additional information has been requested by the FDIC, within 60 days of receipt of the additional information.

(h) Subject to paragraph (e) of this section, the insured depository institution that requested review under this section, or an insured depository institution materially affected by the Director's determination, that disagrees with that determination may appeal to the FDIC's Assessment Appeals Committee on the same grounds as set forth under paragraph (a) of this section. Any such appeal must be submitted within 30 calendar days from the date of the Director's written determination. Notice of the procedures applicable to appeals under this section will be included with the Director's written determination. The decision of the Assessment Appeals Committee shall be the final determination of the FDIC.

(i) Any adjustment to an institution's credits resulting from a determination by the Director of the FDIC's Assessment Appeals Committee shall be reflected in the institution's next assessment invoice. The adjustment to credits shall affect future assessments only and shall not result in a retroactive adjustment of assessment amounts owed for prior periods.

Dated at Washington, DC, this 10th day of October, 2006.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E6–17305 Filed 10–17–06; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AD07

Assessment Dividends

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is adopting a final rule to implement the dividend requirements of the Federal Deposit Insurance Reform Act of 2005 (Reform Act) and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (Amendments Act) for an initial two-year period. The final rule will take effect on January 1, 2007, and sunset on December 31, 2008. During this period the FDIC expects to initiate a second, more comprehensive notice-and-comment rulemaking on dividends beginning with an advanced notice of proposed rulemaking to explore alternative methods for distributing future dividends after this initial two-year period.

EFFECTIVE DATE: January 1, 2007.

FOR FURTHER INFORMATION CONTACT: Munsell W. St.Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898–8967; Donna M. Saulnier, Senior Assessment Policy Specialist, Division of Finance, (703) 562–6167; or Joseph A. DiNuzzo, Counsel, Legal Division, (202) 898–7349.

SUPPLEMENTARY INFORMATION:

I. Background

In May of this year, the FDIC published a proposed rule (the proposed rule) to implement the dividend requirements of the Reform Act. 71 FR 28804 (May 18, 2006). The Reform Act requires the FDIC to prescribe final regulations, within 270 days of enactment, to implement the assessment dividend requirements, including regulations governing the method for the calculation, declaration, and payment of dividends and administrative appeals of individual dividend amounts. See sections 2107(a) and 2109(a)(3) of the Reform Act.[1]

Section 7(e)(2) of the Federal Deposit Insurance Act (FDI Act), as amended by the Reform Act, requires that the FDIC, under most circumstances, declare dividends from the Deposit Insurance Fund (DIF or fund) when the reserve ratio at the end of a calendar year exceeds 1.35 percent, but is no greater than 1.5 percent. In that event, the FDIC must generally declare one-half of the amount in the DIF in excess of the amount required to maintain the reserve ratio at 1.35 percent as dividends to be paid to insured depository institutions. However, the FDIC's Board of Directors (Board) may suspend or limit dividends to be paid, if the Board determines in writing, after taking a number of statutory factors into account, that:

1. The DIF faces a significant risk of losses over the next year; and

2. It is likely that such losses will be sufficiently high as to justify a finding by the Board that the reserve ratio should temporarily be allowed to grow without requiring dividends when the reserve ratio is between 1.35 and 1.5 percent or exceeds 1.5 percent.[2]

In addition, the statute requires that the FDIC, absent certain limited circumstances (discussed in footnote 2), declare a dividend from the DIF when the reserve ratio at the end of a calendar

[1] The Reform Act was included as Title II, Subtitle B, of the Deficit Reduction Act of 2005, Public Law 109–171, 120 Stat. 9, which was signed into law by the President on February 8, 2006. Section 2109 of the Reform Act also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the one-time assessment credit, and assessments. The final rule on deposit insurance coverage was published on September 12, 2006, 71 FR 53547. The final rule on the one-time assessment credit is being published on the same day as this final rule. Final rules on the remaining matters are expected to be published in the near future.

[2] This provision would allow the FDIC's Board to suspend or limit dividends in circumstances where the reserve ratio has exceeded 1.5 percent, if the Board made a determination to continue a suspension or limitation that it had imposed initially when the reserve ratio was between 1.35 and 1.5 percent.